Note

The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress's Exceptions Clause Power

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> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.[1]
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> But it is time we came to realize that in a democracy conflict over basic policy cannot be avoided and that when too long delayed it may, like Langston Hughes' dream deferred, explode.[2]

I. INTRODUCTION: PAST CONGRESSIONAL ACTS AND A NEW PROPOSAL TO LIMIT CONGRESSIONAL AUTHORITY UNDER THE EXCEPTIONS CLAUSE

Throughout the twentieth century, fundamental changes in political power often have ushered in novel and hostile attacks on the federal judiciary's jurisdiction. From the Roosevelt court packing plan,[3] through numerous

1. OLIVER WENDELL HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS 291, 295–96 (1920)
2. J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 586 (1972) (book review)
3. The history of Roosevelt's plan and its eventual failure are well documented in Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043 (1994). *See generally* 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 2.7 (2d ed. 1992) (chronicling history of court packing plan)

proposals during the Reagan years to limit federal court jurisdiction,[4] to the recently enacted Antiterrorism and Effective Death Penalty Act of 1996,[5] the federal courts—and particularly the Supreme Court—often have occupied the center of political power struggles.

With the 1994 "Republican revolution,"[6] dormant proposals to limit Supreme Court jurisdiction may have found new life.[7] In response to perceived abuses of the writ of habeas corpus, Congress enacted the Antiterrorism Act to eliminate second or successive appeals of habeas applications to the Supreme Court.[8] Though rarely invoked during the history of the American republic, Congress exercised its Exceptions Clause power under Article III[9] to strip the Supreme Court of jurisdiction to hear appeals from lower court denials of second habeas petitions: "[T]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."[10] In *Felker v. Turpin*, the Supreme Court resolved the legitimacy of the Act without addressing the constitutionality of the jurisdiction stripping provision.[11] Nonetheless, the Act presents grave questions about one of Congress's potentially greatest powers.

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4. During the early 1980s, there were numerous proposals that would have removed controversial issues from the jurisdiction of the federal courts. Many of these bills attempted to deny the lower federal courts jurisdiction to issue restraining orders, injunctions, and declaratory judgments over state abortion laws. *See, e.g.*, H.R. 3225, 97th Cong. § 4 (1981); H.R. 900, 97th Cong. § 2 (1981); S. 158, 97th Cong. § 2 (1981). Congress also attempted to withdraw the Supreme Court's jurisdiction over abortion issues. *See, e.g.*, H.R. 867, 97th Cong. § 1 (1981).

School prayer proved equally prone to congressional attempts at jurisdiction stripping. Several bills sought to deny to all federal courts—including the Supreme Court—the jurisdiction to hear cases contesting state laws that authorized public school prayer. *See, e.g.*, H.R. 2347, 97th Cong. §§ 2–3 (1981); S. 481, 97th Cong. §§ 2–3 (1981); H.R. 865, 97th Cong. §§ 2–3 (1981); H.R. 72, 97th Cong. §§ 1–2 (1981).

5. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

6. *See, e.g.*, R.W. Apple, Jr., *Voters May Feel Powerless, But They're Not Frightened*, N.Y. TIMES, May 28, 1995, at 1 (characterizing 1994 general election in which Republicans gained majority in both House and Senate as "Republican revolution"); David S. Broder, *Looking for Leadership*, WASH. POST, Nov. 6, 1995, at A1 (same).

7. Judge Hufstedler has commented that "congressional reaction to issues of federal jurisdiction has always been fitful and . . . the fits are usually induced by strong pressures imposed by particular events or by powerful constituencies that seek to influence results in particular causes that concern them." Shirley M. Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841, 842–43 (1972).

8. *See* § 106(b)(1)–(2), 110 Stat. at 1220–21.

9. U.S. CONST. art. III, § 2 provides in pertinent part:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

10. § 106(b)(3)(E), 110 Stat. at 1221.

11. *See* Felker v. Turpin, 116 S. Ct. 2333, 2338–39 (1996). As discussed in Section II.B, *infra*, the Court found that the Act did not reach the Court's original jurisdiction to grant habeas petitions pursuant to 28 U.S.C. § 2241 (1994). *See Felker*, 116 S. Ct. at 2339. By finding that the Act did not entirely repeal the Court's "authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2." *Id.*

Habeas corpus, however, represents but one controversial issue that has divided the Court and Congress. While the Court's decision in *Casey v. Planned Parenthood*[12] may have temporarily resolved a constitutional legal question, the decision did nothing to quell the fervor with which many Americans approach the issue of abortion.[13] Moreover, Congress remains preoccupied with the Court's 1989 decision invalidating a Texas flag burning statute.[14] Its recent failure to pass a constitutional amendment[15] that would have reversed the Court's ruling may impel some members of Congress to seek alternative means of escaping the Court's rulings. Set within this new political climate, the saliency of abortion, death penalty appeals, and other controversial constitutional issues may renew congressional efforts to restrict the Supreme Court's appellate jurisdiction over these classes of cases.[16]

In the end, the *Felker* decision may be a lot of sound and fury signifying nothing about the Exceptions Clause. Of far greater significance, however, is the simple fact that Congress mustered the political will to strip the Supreme Court of its appellate jurisdiction. Whether the Antiterrorism Act is an anomaly or a precursor to increasing attempts at jurisdiction stripping remains to be seen. This Note attempts to provide a principled theory that may be applied if Congress once again tests its Article III power.

In unqualified language, Article III of the Constitution provides that the "supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*"[17] Scholars who have addressed this issue before have divided into two extremes: those who find Congress may act with plenary authority and those who would limit Congress's power so as not to intrude upon the Supreme Court's "essential functions."[18] Problems exist with both theories. The exceptional congressional power that the absolutists envision would undermine important constitutional structure. On the other hand, essential functions proponents are

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12. 505 U.S. 833 (1992) (reaffirming constitutional right to abortion)

13. *See* Alissa J. Rubin, *As Congress Takes up Social Issues, Whose Values Will Prevail*, WASH POST, May 7, 1995, at C3 (citing 1992 *Washington Post* poll indicating 80% of Americans favor parental notification and 1992 Gallup poll indicating 75% support 24-hour waiting period); Robin Toner, *Success Spoils Unity of Abortion Rights Groups*, N.Y. TIMES, Apr. 20, 1993, at A18 (noting majority support for abortion, but overwhelming support for some regulation short of absolute ban).

14. *See* Texas v. Johnson, 491 U.S. 397 (1989); *see also* United States v. Eichman, 496 U.S. 310 (1990).

15. *See* Kenneth J. Cooper, *House Approves Amendment on Flag Desecration, Measure Would Override High Court Rulings, Let States and Congress Outlaw the Act*, WASH. POST, June 29, 1995, at A7 (documenting successful 312-120 House vote); Helen Dewar, *Senate Falls Short on Flag Amendment, Desecration Ban Was Measure's Aim*, WASH. POST, Dec. 13, 1995, at A1 (noting Senate's 63-36 defeat of amendment, three votes short of requisite two-thirds majority)

16. Senator Jesse Helms claims constitutional support for his proposals to withdraw jurisdiction from the Supreme Court: "In anticipation of judicial usurpations of power, the framers of our Constitution wisely gave the Congress the authority, by a simple majority of both Houses, to check the Supreme Court by means of regulation of its appellate jurisdiction." 125 CONG. REC. 7579 (1979)

17. U.S. CONST. art. III, § 2 (emphasis added).

18. *See infra* Part III (discussing various theories concerning jurisdiction stripping legislation)

unable to reconcile their position with the literal language of Article III.[19] Yet there does exist common ground. All commentators recognize that Congress still must abide by "external" constitutional constraints. That is, generally applicable limitations on congressional lawmaking—equal protection and bill of attainder prohibitions, for example—do not vanish merely because Congress invokes its Exceptions Clause power.

This Note suggests new constraints on Congress's power to restrict the Court's appellate jurisdiction. The recent importance attached to the doctrine of political accountability provides a different set of limits on congressional power under Article III. In the administrative law context, when Congress seeks to impose controversial policy, it often passes vague laws that delegate to other entities the authority to prescribe substantive policy. Such policy delegation facilitates Congress's ability to pass divisive legislation. Congress's diminished accountability to the electorate has captured the concern of courts and commentators alike—leading many to conclude that unaccountable legislation is unconstitutional legislation.[20]

The doctrine of political accountability, as a generally applicable, external constraint on congressional power, requires Congress to address affirmatively underlying policy concerns when it seeks to revoke Court jurisdiction. Under this theory, Congress retains plenary authority to restrict the Court's jurisdiction over *laws that Congress itself passes*. If, for example, Congress passed its own flag burning law, and then stripped the Court of jurisdiction to hear challenges to the law, there would be no violation of political accountability because Congress squarely addressed the underlying issue: whether flag burning can be proscribed. But, political accountability militates against Congress insulating *state laws* from Court review in the manner that it traditionally has attempted to employ. Most, if not all, of Congress's recent jurisdiction stripping proposals deny the Court jurisdiction to hear *any state law* regulating abortion.[21] This sidesteps the fundamental policy determination: to what extent abortion should be regulated.

The political accountability doctrine, however, is not so rigid as to prevent Congress from balancing whatever slight federalism interest there exists in exempting state laws from Court review. If Congress affirmatively decides the parameters within which the states may act, it will have accountably addressed the substantive policy questions. Thus, if Congress were to pass a law that "authorized" the states to regulate abortion so long as an exception were made

19. *But see* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242 (1985). Amar emphasizes that the word "all" is selectively used in Article III to define those cases to which the judicial power "shall extend." Where the Constitution extends jurisdiction to "all cases," Amar reads this as an immutable grant of jurisdiction; where the "all" has been omitted, he is willing to concede that Congress may restrict federal court jurisdiction. For further discussion of Amar's theory, as well as its critics, see *infra* note 51.

20. *See infra* Part IV.

21. *See supra* note 4.

for emergency health situations, and concomitantly exempted this statute from the Court's appellate jurisdiction, this would comport with political accountability. Here, Congress is acting notoriously; its "political decisions satisfy the fundamental principle that those with the power to make decisions should bear, to the fullest extent possible, the costs and benefits and the credit and blame for their decisions."[22]

The application of the doctrine of political accountability to the Exceptions Clause has many advantages. First, it accepts Article III's literal language, and does not require novel linguistic acrobatics. Second, a natural product of this theory is that it will increase congressional deliberation. In turn, greater deliberation will likely minimize the frequency with which Congress invokes the Exceptions Clause, and suggests that when it does so, its proposals will reflect greater moderation than if it legislated free from accountability requirements. Although political accountability erects an important procedural limitation on Congress's Exceptions Clause authority, the substantive power remains as potent as ever; only now, Congress must muster a true national consensus before it legislates. Moreover, the doctrine is sensitive to federalism. Political accountability preserves Congress's ability to insulate state laws from Court review provided that Congress affirmatively delineates how far the states may legislate free from Court review. That political accountability requires Congress to define the limits of state action is no infringement on federalism. After all, Congress could impose no limits on state regulation, so long as it explicitly communicates this to the electorate through an open debate and vote.

In this Note, Parts II and III examine the manner in which the Court and scholars have grappled with jurisdiction stripping. Part IV explores the evolution of political accountability, and applies the doctrine to the Exceptions Clause debate—demonstrating how this constitutional doctrine provides a salutary basis for defining congressional authority over the Court's exercise of judicial review. Part V offers a brief conclusion.

II. FROM *MCCARDLE* TO *FELKER*: AN EXAMINATION OF THE SUPREME COURT'S APPROACH TO THE EXCEPTIONS CLAUSE

Since the days of John Marshall,[23] the Supreme Court has been a perennial target of political attacks. While Congress has made several attempts to restrict Supreme Court jurisdiction,[24] it has succeeded only once.[25]

22. D. Bruce LaPierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 646 (1985).

23. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), the Marshall Court affirmed the Supreme Court's authority to review and invalidate unconstitutional state laws. In turn, this ruling prompted radical states' rights advocates to attempt to repeal section 25 of the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (1861), which provided the basis for the Court's review of state laws.

24. *See supra* note 4.

Despite the limited opportunity for the Court to pass upon the constitutionality of this practice,[26] legal academics have more than made up for the lack of Court precedent.[27]

A. Ex parte McCardle*: The Court Addresses Jurisdiction Stripping*

The only opportunity for the Supreme Court to address directly the scope of Congress's power under the Exceptions Clause came in 1868.[28] Charged with various offenses under the Reconstruction Acts, including "disturbing the peace, inciting to insurrection and disorder, libel, and impeding reconstruction,"[29] McCardle unsuccessfully brought an action for habeas corpus in federal court. McCardle appealed the denial of his habeas petition to the Supreme Court under an 1867 congressional statute authorizing the Court to hear habeas appeals.[30] Three days after the Court heard arguments on the merits of McCardle's appeal,[31] the Reconstruction Congress repealed the jurisdiction granting portion of the 1867 law. After a year of delay,[32] the

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25. *See* Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44 (1869) (repealing Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1868)).

26. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (upholding Congress's revocation of Court's authority to hear habeas corpus case). The *McCardle* decision and its significance are discussed *infra* Section II.A.

27. The vast body of commentary makes it impossible to provide an exhaustive list of sources. The more notable contributions include: Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Amar, *supra* note 19; Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Leland E. Beck, *Constitution, Congress, and Court: On the Theory, Law, and Politics of Appellate Jurisdiction of the United States Supreme Court*, 9 HASTINGS CONST. L.Q. 773 (1982); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982) [hereinafter Ratner, *Majoritarian Constraints*]; Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960) [hereinafter Ratner, *Congressional Power*]; Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982); Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385 (1983); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

28. *See McCardle*, 74 U.S. (7 Wall.) 506.

29. William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229, 236 (1973).

30. *See* Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (1868).

31. It should be noted that before the argument on the merits of McCardle's habeas petition, the Court held a preliminary argument to address whether the new 1867 habeas law provided the Court with jurisdiction to hear McCardle's appeal. *See Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1867). The Court established that the case was properly before it and asked the parties to brief and argue the merits.

32. Indicative of the political context in which the *McCardle* case was decided, the year-long delay in reargument stemmed from Chief Justice Chase's duty to preside over the impeachment proceedings of President Andrew Johnson. Moreover, Johnson had unsuccessfully vetoed Congress's repeal of the Court's 1867 habeas jurisdiction. For an excellent presentation of the political and legal background to the

parties reargued the case, focusing on the effect of Congress's withdrawal of jurisdiction.

Chief Justice Chase's opinion broadly affirmed Congress's plenary power to regulate the Court's appellate jurisdiction. Without resort to complex, structural analyses or to the Framers' intent, the Court easily dispensed with the case by mechanically applying the literal language of Article III. Echoing the Exceptions Clause's prose, the Chief Justice noted that although the Constitution conferred appellate jurisdiction on the Court, it did so "'with such exceptions and under such regulations as Congress shall make.'"[33] Congress's specific repeal of the Court's 1867 habeas jurisdiction made "[i]t . . . hardly possible to imagine a plainer instance of positive exception."[34]

Despite the unqualified tone of the opinion, the unique political environment surrounding the case[35] suggests that *McCardle* may be read more narrowly. The Court, no doubt, recognized that a contrary decision would invite an inevitable dispute with Congress. Already under attack from Congress, the Court had witnessed the legislature slash its membership from ten to seven justices.[36] Moreover, the House already had passed a bill that would have required a supermajority of the Court to invalidate an act of Congress.[37]

Of perhaps greatest significance, the 1867 law under which McCardle originally brought his habeas appeal merely supplemented a preexisting avenue of appeal. Section 14 of the Judiciary Act of 1789 already provided that the Supreme Court and "all the before-mentioned courts of the United States, shall have power to issue writs of . . . *habeas corpus*."[38] Cognizant of this alternative, the Court was able to avoid a political confrontation with Congress by affirming its Exceptions Clause power, yet preserve the right of future petitioners to obtain writs of habeas corpus from the Court through an alternative legislative authorization. Indeed, in *McCardle*, the Court, possibly offering litigating hints to prospective petitioners, concluded its opinion with the following observation:

> Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.[39]

McCardle case, see Van Alstyne, *supra* note 29.

33. *McCardle*, 74 U.S. (7 Wall.) at 513 (quoting U.S. CONST. art. III, § 2)
34. *Id.* at 514.
35. *See supra* note 32 for factors contributing to this political context.
36. *See* Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209 (1868)
37. *See* H.R. 379, 40th Cong. (1868).
38. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (1861)
39. *McCardle*, 74 U.S. (7 Wall.) at 515.

A year after the *McCardle* decision, the Court affirmed its jurisdiction over habeas petitions brought pursuant to section 14 of the Judiciary Act of 1789 in *Ex parte Yerger*:

> Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of *habeas corpus*, were repealed by the act of that year . . . and [the 1868 act] must be limited in effect to the appellate jurisdiction authorized by the act of 1867.[40]

Ultimately, the Justices probably wanted not only to avoid confrontation with Congress, but also to avoid prolonging the divisions that still remained from the Civil War.[41]

B. Felker v. Turpin: McCardle *Revisited 128 Years Later*

Nine days after President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996[42] into law, the Supreme Court granted certiorari to determine whether the Act's revocation of the Court's jurisdiction over successive habeas petitions was constitutional.[43] Congress created a "'gatekeeping' mechanism for the consideration of second or successive applications in district court."[44] Under this gatekeeping structure, a three-judge panel of appeals court judges determines whether an applicant's second habeas petition should be granted. Whether the three-judge panel denies or grants the petition, its decision "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."[45] Congress's attempt to remove habeas petitions from the Supreme Court's appellate jurisdiction offered the Justices an opportunity to resolve definitively the scope of Congress's Exceptions Clause power. The Court, however, balked at reaching this sensitive issue. Instead, it adopted the rationale of *Ex parte Yerger*.[46] As in *Yerger*, the *Felker* Court refused to find that the jurisdiction stripping legislation extended by implication to the Court's authority to grant habeas petitions brought pursuant to the Court's original jurisdiction under 28 U.S.C. § 2241.[47]

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40. 75 U.S. (8 Wall.) 85, 106 (1868).
41. *See* Van Alstyne, *supra* note 29, at 248.
42. Pub. L. No. 104-132, 110 Stat. 1214 (1996).
43. *See* Felker v. Turpin, 116 S. Ct. 2333 (1996).
44. *Id.* at 2337.
45. § 106(b)(3)(E), 110 Stat. at 1221.
46. 75 U.S. (8 Wall.) 85, 106 (1868).
47. *Felker*, 116 S. Ct. at 2339. Section 2241 is the modern version of section 14 of the Judiciary Act of 1789.

The *Felker* Court explained that because the Act did not repeal the Court's "authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."[48] Although the Court refused to decide *Felker* based on the Exceptions Clause, three Justices wrote separately "to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."[49]

III. OF ABSOLUTES, ESSENTIAL FUNCTIONS, AND EXTERNAL CONSTRAINTS: A BRIEF OVERVIEW OF SCHOLARLY OPINION

Despite its astounding volume, the scholarly debate over the Exceptions Clause has been marked by a surprising lack of diversity of arguments. The debate over jurisdiction stripping is largely between only two schools of thought.[50] Despite subtle differences within each theory, the arguments conclude either that: (1) Article III contains implicit internal constraints on Congress's Exceptions Clause power;[51] or (2) the Exceptions Clause broadly empowers Congress to restrict Supreme Court jurisdiction.[52] In order to place my theory in proper context, I will briefly summarize this ongoing dialogue and indicate why neither view is satisfactory.

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48. *Felker*, 116 S. Ct. at 2339.

49. *Id.* at 2342 (Stevens, Souter, Breyer, JJ., concurring).

50. For an excellent collection of essays from scholars on both sides of the issue, see Symposium, *Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV 893 (1982) (containing essays from Paul M. Bator, Charles E. Rice, Martin H. Redish, Leonard G. Ratner, Dr. James McClellan, and Kenneth R. Kay).

51. *See, e.g.*, Amar, *supra* note 19; Amar, *supra* note 27, Robert N Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U PA L. REV. 741 (1984); Eisenberg, *supra* note 27; Ratner, *Majoritarian Constraints*, *supra* note 27

To be sure, theories outside of the established schools of thought exist which turn on subtle linguistic interpretations of Article III. First, several commentators argue that the Exceptions Clause only modifies the word "Fact," instead of "appellate jurisdiction" as is generally accepted. *See, e.g.*, RAOUL BERGER, CONGRESS V. THE SUPREME COURT 285–96 (1969); Irving Brant, *Appellate Jurisdiction. Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973). This theory's paucity of historical support, coupled with its odd grammatical interpretation, has made it the target of substantial criticism *See, e.g.*, Gunther, *supra* note 27, at 901; Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under an Internal and External Examination*, 27 VILL. L. REV 900, 913–15 (1982) [hereinafter Redish, *Congressional Power*].

A second theory also requires a novel linguistical approach to Article III. Professor Amar argues that the word "all" delineates the power Congress possesses to restrict federal court jurisdiction *See* Amar, *supra* note 19, at 238–54. Among the classes of cases and controversies enumerated in Article III, Amar notes that only three classes of cases are preceded by "all." In those cases preceded by "all," including "cases arising under federal law," Amar would prohibit Congress from removing federal court jurisdiction Like Burger's theory, Amar's theory has not been immune from criticism *See, e.g.*, William R Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control Over Federal Jurisdiction*, 7 CONST COMMENTARY 89 (1990); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990) [hereinafter Redish, *Common Sense*]

52. *See, e.g.*, Gunther, *supra* note 27; Redish, *supra* note 27

A. *"Essential Functions" and Other Internal Constraint Theories*

In what may be the single most famous sentence to address this issue, Professor Henry Hart admitted that Congress possessed the authority to restrict the Court's jurisdiction, but insisted that "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[53] Despite Hart's failure to define the precise contours of his theory, subsequent scholars have attempted to add meaning to this phrase. While minor differences exist between Hart's disciples, they all conclude that the theory proscribes wholesale elimination of the Court's jurisdiction over discrete classes of cases.

Professor Leonard Ratner was the first to add substance to the framework Hart established.[54] Ratner answered the question: "What exactly are the Supreme Court's essential functions?" According to him, two elements defined the Court's essential functions: "(1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority."[55] Essential functions scholars since Ratner have continued to emphasize the Court's primary role as guarantor of uniformity and supremacy of federal law. Moreover, even absolutists who criticize Ratner's theory concede that a grant of plenary power to Congress would undoubtedly inhibit, if not destroy, these two functions.[56]

Notwithstanding the common sense appeal of the essential functions theory, it suffers from the affliction common to all internal constraints theories: Neither the term, "essential functions," nor the propositions for which it stands can be found within the language of Article III.[57] Essential functions advocates, therefore, draw upon historical records—namely, the notes taken during the Constitutional Convention—to vindicate their theory.[58] There is evidence to make at least a colorable argument that the Framers recognized the

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53. Hart, *supra* note 27, at 1365. Later in his constructed dialogue, Hart concedes that applying an essential functions calculus to jurisdiction stripping bills might be imprecise. Nevertheless, he concludes with the rhetorical question: "[W]hatever the difficulties of the test, they are less, are they not, than the difficulties of reading the Constitution as authorizing its own destruction?" *Id.*

54. *See* Ratner, *Congressional Power*, *supra* note 27.

55. *Id.* at 161. Twenty-two years later, Professor Ratner elaborated on the destructive effect that plenary congressional power would precipitate:

> Such legislation would distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution. It would reduce the supreme law of the land to a hodgepodge of sometimes inconsistent decisions by fifty state supreme courts and/or twelve federal courts of appeals. It would thereby fragment and vitiate constitutional protections.

Ratner, *Majoritarian Constraints*, *supra* note 27, at 935.

56. *See, e.g.*, Bator, *supra* note 27, at 1038–39 (noting that jurisdiction stripping would undermine constitutional structure and spirit, but that literal language of Constitution sanctions such practices).

57. *See* U.S. CONST. art. III, § 2.

58. *See, e.g.*, Ratner, *Congressional Power*, *supra* note 27, at 161–65; Sager, *supra* note 27, at 45–55.

Court's unique and essential role in ensuring uniformity and supremacy of federal law.[59] Yet the historical record offers equivocal support at best.

Ultimately, when one considers the literal language of Article III, the internal constraints interpretation is, as some commentators have put it, "constitutional wishful thinking"[60] and "question-begging."[61] If the Framers had wished to qualify the Exceptions Clause by some principle akin to the essential functions thesis, "why did they not simply say so?"[62] That is, why would the Framers adopt the unqualified language of the Exceptions Clause, "the textual nub of the controversy,"[63] if they intended to limit congressional power over the Court's appellate jurisdiction?

The seemingly unbridled power unanimously affirmed in *Ex parte McCardle*[64] has not gone unnoticed by essential functions critics.[65] Indeed, the opinion erects a large doctrinal obstacle to any internal constraint argument. However, pointing to the divisive political context in which the *McCardle* decision was written, internal constraint theorists argue that the decision should not be afforded great precedential value. Professor Lawrence Gene Sager, for example, has suggested that "the Court acted in a highly unusual historical context," and therefore its "dicta . . . cannot be given much weight."[66] Although *McCardle* should be considered in its historical context, it nevertheless remains in the United States Reports. Insofar as *McCardle* is the only case in which the Court has addressed Congress's authority under the Exceptions Clause, it is difficult to imagine that a federal court would reject the decision out of hand.

In the end, the Exceptions Clause's sweeping language, the equivocal historical record, and the Court's affirmation of plenary congressional power in *McCardle* undermine internal constraint theories. While essential function

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59. Two historical events during the Convention have provided the most salient bases for supporting the essential functions thesis. First, South Carolina's John Rutledge, perhaps the Convention's strongest Antifederalist, argued against the constitutional creation of lower federal courts but conceded that "the State Tribunals might and ought to be left in all cases to decide in the first instance *the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts* [sic]" 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (1911) (emphasis added).

Second, the Exceptions Clause was adopted only after the Convention had rejected a provision that purportedly would have given Congress even greater power over the Court's appellate jurisdiction. "In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct." 2 *id.* at 431. As Professor Sager asserts, the defeat of this provision, coupled with the subsequent adoption of the Exceptions Clause, undermines the notion that "the framers were consciously adopting a provision that could completely unravel one of the most basic aspects of the constitutional scheme to which they had committed themselves." Sager, *supra* note 27, at 51.

60. Redish, *Congressional Power*, *supra* note 51, at 911.

61. Gunther, *supra* note 27, at 908.

62. Redish, *Congressional Power*, *supra* note 51, at 911, *see also* Gunther, *supra* note 27, at 906.

63. Gunther, *supra* note 27, at 906.

64. *See supra* Section II.A.

65. *See, e.g.*, Bator, *supra* note 27, at 1040 (arguing that *McCardle* vindicates plenary view of Exceptions Clause); Gunther, *supra* note 27, at 904–05 (same). Redish, *Congressional Power*, *supra* note 51, at 904 (same).

66. Sager, *supra* note 27, at 78 n.187.

concerns for supremacy and uniformity of law offer salutary arguments for why Congress *should not* strip the Court of jurisdiction, it does not explain why Congress *may not* do so.

B. *The Absolutists*

Those who believe that the Exceptions Clause grants plenary authority to Congress to restrict the Court's jurisdiction predicate their argument primarily on the literal meaning of Article III. One commentator, whose view serves as a pithy summary of the absolutist position, has remarked that Congress's power under Article III

> does not know any interior restrictions. The emphasis is appropriately on the adjective "such." That is to say, such exceptions as Congress shall make.
>
> . . . .
>
> Like the commerce power, [Congress's control over jurisdiction] may be put to promiscuous and undesirable uses, but the power is there to make those damaging uses.[67]

The power absolutists envision is an awesome one. Of course, one could construct a parade of horribles such that every class of case was relegated to state court adjudication. Yet what makes this power as conceived by absolutists so frightening is the fact that Congress has attempted to withdraw the Court's jurisdiction over a number of highly divisive and constitutionally sensitive issues ranging from abortion to school prayer to habeas corpus appeals.[68]

Proponents of plenary congressional power assert that the Framers adopted the Exceptions Clause in order to provide Congress with a check against Supreme Court excesses.[69] They argue that the Framers, recognizing that the Court would be able to review the constitutionality of congressional legislation,[70] believed that the legislature would need an instrument to act as both a shield and a sword. When compared with other congressional checks on the judiciary, however, the Exceptions Clause resembles a meat cleaver more than a scalpel.[71]

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67. *Constitutional Restraints upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 99 (1981) [hereinafter *Constitutional Restraints*] (statement of William Van Alstyne).

68. *See supra* notes 4–5 and accompanying text.

69. *See, e.g.*, Gunther, *supra* note 27.

70. *See* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that limitations on powers narrowly delegated to Congress "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void").

71. Some examples of lesser checks are confirmation of presidential nominees, impeachment, and reducing or augmenting the size of the Court.

The absolutist position, despite its staggering implications, nevertheless remains an extremely sound textual argument. While critics of this school of thought strain to devise novel interpretations of Article III, the absolutists have enjoyed the luxury of retreating to the explicit language of the Exceptions Clause—language which on its face is unequivocal.

C. *Common Ground: Limiting the Exceptions Clause by Applying External Constitutional Constraints*

Despite the hermetic separation between absolutists and their critics over internal constraints on congressional power to restrict Court jurisdiction, most commentators agree that Congress must still abide by the other generally applicable constraints on congressional lawmaking. The plenary authority with which absolutists would invest Congress is not unfettered. Rather, even absolutists concede that general constitutional provisions external to Article III, such as the Bill of Rights,[72] equal protection,[73] and prohibitions contained in section 9 of Article I[74] remain applicable to congressional exercise of the exceptions power.[75] Congress's power under the Exceptions Clause, as absolutists conceive it, "cannot be exercised in a manner which violates some other Constitutional rule. In that sense—and in that sense only—it can be said that Congress' power is not plenary."[76]

Because I will attempt to portray my theory as an external constitutional constraint, this point deserves elaboration. The arena in which Congress traditionally has enjoyed robust power is when it legislates pursuant to the Commerce Clause. Nonetheless, irrespective of how broadly one defines congressional authority under the Exceptions Clause, Congress must still abide by external constitutional constraints such as the Equal Protection Clause. Despite its extensive authority over interstate commerce, none would concede that the Commerce Clause empowers Congress to restrict travel on interstate highways only to whites or Episcopalians. For example, one prominent advocate of plenary congressional power under the Exceptions Clause agrees that "broad as the power is in Congress to make exceptions to the appellate jurisdiction of the Supreme Court, it is not exempt from other constitutional provisions, lying outside the 'exceptions' clause, that indeed describe limitations that cut across most of the enumerated powers of Congress."[77]

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72. *See* U.S. CONST. amends. I–X.

73. *See* U.S. CONST. amend. V; *see also* Bolling v. Sharpe, 347 U.S. 497 (1954) (incorporating equal protection guarantees into Fifth Amendment).

74. *See* U.S. CONST. art. I, § 9.

75. *See, e.g.*, *Constitutional Restraints*, *supra* note 67, at 45 (statement of Paul M. Bator); *id.* at 129–32 (statement of William Van Alstyne); Bator, *supra* note 27, at 1034; Gunther, *supra* note 27, at 916; Redish, *Congressional Power*, *supra* note 51, at 915–23; Van Alstyne, *supra* note 29, at 263.

76. *Constitutional Restraints*, *supra* note 67, at 44–45 (statement of Paul M. Bator).

77. *Id.* at 132 (statement of William Van Alstyne).

This notion—that the Exceptions Clause power is "policed from the outside"[78]—provides a salutary limitation on congressional authority to strip the Court of its appellate jurisdiction.

A hypothetical example illustrates the distinction between "internal" and "external" constraints. Perhaps the clearest illustration of an unconstitutional use of the exceptions power would be a law denying the Supreme Court jurisdiction to hear cases brought by African Americans. Notwithstanding the invocation of the Exceptions Clause, Congress's explicit racial classification would demand application of strict scrutiny analysis[79] and ultimately would be found to violate the equal protection component of the Fifth Amendment.[80] Whatever the scope of Congress's power under the Exceptions Clause, none would admit that it sanctions invidious discrimination.

It is important to distinguish between excepting federal court jurisdiction over particular racial or religious groups and excepting jurisdiction over particular classes of litigation. While the Constitution requires that Congress legislate neutrally with respect to race or religion, "there is no independent constitutional rule which says, absolutely or presumptively, that various categories of constitutional litigation must be treated alike."[81] For example, assume that in 1981 Congress had passed H.R. 867, which would have removed the Court's jurisdiction to hear any case that construed or interpreted a state statute pertaining to abortion.[82] Although such a law would violate the constitutional requirement of political accountability, as I argue later, the law does not offend any other external constitutional provision or doctrine.[83] Note that, on its face, the law does not deny access to the Supreme Court based on a protected classification. To be sure, the law might have a disproportionate effect of keeping women out of the Court. However, the law equally would deny a state that passed a restrictive abortion law, which was ruled unconstitutional by a lower state or federal court, from appealing this ruling.

Commentators have failed to address whether the principle of external constraints extends beyond explicit constitutional provisions to encompass constitutional principles, which similarly regulate congressional lawmaking. That is, concepts such as federalism,[84] separation of powers, and, as I argue

78. *Id.* at 99.

79. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Loving v. Virginia, 388 U.S. 1 (1967).

80. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that principles of equal protection are incorporated in Fifth Amendment's Due Process Clause).

81. *Constitutional Restraints*, *supra* note 67, at 34 (statement of Paul M. Bator).

82. *See* H.R. 867, 97th Cong. § 1 (1981).

83. *See infra* Section IV.C.

84. Admittedly, the Tenth Amendment's reservation of powers "not delegated to the United States by the Constitution" to the separate states embodies classical principles of federalism. Particularly in the arena of abstention doctrine, however, the Court's invocation of powerful notions such as "Our Federalism" rests upon foundations broader than just the Tenth Amendment:

> [O]ne familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." . . .

later, political accountability[85] are not explicitly guaranteed or enshrined in the Constitution. Nevertheless, they have traditionally served as potent checks on Congress's lawmaking authority. Logically, there appears to be no reason to limit Congress's power under the Exceptions Clause through application of equal protection principles, yet deny the same limits based on separation of powers or political accountability merely because the latter lack corresponding, explicit constitutional provisions.

IV. UNDERSTANDING POLITICAL ACCOUNTABILITY AS AN EXTERNAL CONSTRAINT

The doctrine of political accountability resolves the Exceptions Clause's tension between Article III's plain language and constitutional design. More accurately, political accountability prescribes a particular constitutional process and design. It is within this paradigm of legislative responsibility that Congress must always act—including invocations of its Exceptions Clause power.

This Note focuses on the inherent illegitimacy of legislation when Congress fails to address the underlying policy questions. By deferring resolution of the tough policy choices to the states, Congress is able to implement national objectives without incurring the corresponding political costs, thus "bypass[ing] constitutional requirements for proper federal lawmaking."[86] The absence of political accountability "enable[s] Congress to advance federal policy through state institutions when a lack of majority support for substantive national legislation might otherwise prevent federal regulation."[87] Often, Congress may wish to implement ambitious programs, yet lacks a majority willing to subject itself to direct voter scrutiny. At a minimum, political accountability requires Congress to "pass laws or make binding policy in such a way that an electorate can hold Congress responsible for that policy."[88] Departing from standards of political accountability becomes an attractive option when "Congress cannot agree on the virtue of a national regulatory plan."[89] Yet we must question whether the ultimate product is valid. Such a practice is not only an unprincipled method of legislating, but is also arguably unconstitutional.

It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future

Younger v. Harris, 401 U.S. 37, 44–45 (1971). Thus, judicial conceptions of constitutional structure, design, and Founding intent, in addition to the Tenth Amendment, inform our understanding of federalism

85. *See infra* Part IV.

86. *The Supreme Court, 1981 Term*, 96 HARV. L. REV 62, 190–91 (1982) [hereinafter *1981 Term*]

87. *Id.* at 191.

88. Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV 62, 63 n 7 (1990); *see also* LaPierre, *supra* note 22, at 640 (defining political accountability as "the 'answerability' of representatives to the represented").

89. *1981 Term*, *supra* note 86, at 191.

As a child of the administrative state, the doctrine of political accountability has received its greatest attention in the context of congressional delegation.[90] The doctrine, however, has enjoyed considerable success in assessing judicial recognition of implied rights of action in federal legislation.[91] Neither previous scholarship nor logic offers reasons why the same principles that animate modern critiques of deceptive congressional practices should not apply where Congress has discovered innovative measures to bypass public scrutiny in contexts that implicate core constitutional values. Indeed, as I argue later,[92] the imperative to question such practices is even greater in the arena of fundamental rights than in the realm of economic, administrative actions.[93]

A. *The Tenets and Rationales of the Political Accountability Doctrine*

Fundamental to our democratic heritage is a watchful, vigilant public. Yet when the legislature is able to implement important social policies while evading the political pressures of public scrutiny, the legislative product is illegitimate. Without political accountability, "[t]he public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process."[94] Political accountability demands that when Congress acts, it must decide the salient issues—not defer to some other organ of government.

Of course, the reason Congress would wish to elude political accountability is clear: It is often difficult to muster a majority vote on divisive social issues. As congressional ability to insulate divisive policy decisions from public scrutiny increases, the more likely it is that Congress will sustain majority votes. In other words, the ability of Congress to implement divisive policy may at times be inversely proportional to the level of public scrutiny.

Several interrelated theories strongly suggest that the doctrine of political accountability is a prerequisite to constitutional legislation. First, political accountability is a function of checks and balances.[95] Checks and balances, in turn, are intended to ensure that the tumultuous legislative process will

90. *See, e.g.*, James F. Blumstein, *Constitutional Perspectives on Governmental Decisions Affecting Human Life and Health*, 40 LAW & CONTEMP. PROBS., Autumn 1976, at 231; LaPierre, *supra* note 22; Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

91. *See infra* text accompanying notes 107–15.

92. *See infra* text accompanying notes 158–62.

93. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (raising question, without deciding, "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

94. Cannon v. University of Chicago, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

95. *See* LaPierre, *supra* note 22, at 642.

distill the wisest and most rights-protective government policy.[96] Where Congress is permitted to insulate itself from the political ramifications of the policy it sets in motion, the legitimacy of that law is suspect.

The constitutional design never contemplated that the legislative process would elevate efficiency above individual liberty and policy wisdom. If anything, the Framers explicitly engineered a system in which legislating would be a laborious and intentionally inefficient process—thereby maximizing societal input and minimizing the possibility that factions (majority or minority) could subvert liberty interests.[97] The Supreme Court has acknowledged that the Framers intended the legislative process to be deliberative—even at the cost of inefficiency:

> [I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency. The records of the Convention and debates in the states preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.[98]

Thus, commentators have found in the arena of administrative delegation that, although it might be more efficient to defer to the wisdom of agency experts, ultimate wisdom compels deference to the original constitutional design.[99]

Even apart from questions of administrative delegation, Congress frequently attempts to insulate its actions merely because it lacks the political courage to accept the consequences of its political choices.[100] Divisive social issues invariably complicate the passage of comprehensive legislation. Even if a majority of the members of Congress concur that a pending bill will advance national interests, electoral pressures ultimately may trump perceived wisdom.

This congressional phenomenon has not gone unnoticed by legal commentators. Concerning the absence of political accountability in the administrative state, Judge J. Skelly Wright observed that "[w]hen Congress is too divided or uncertain to articulate policy, it is no doubt easier to pass an organic statute with vague language about the 'public interest' which tells the

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96. *See* Krent, *supra* note 88, at 65 n.11.

97. *See* THE FEDERALIST NO. 51, *supra* note 70, at 325 (James Madison) ("In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . . ."); *see also* THE FEDERALIST NO 10, *supra* note 70, at 77 (James Madison) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.")

98. INS v. Chadha, 462 U.S. 919, 958–59 (1983).

99. *See, e.g.*, Krent, *supra* note 88, at 65 n.11.

100. *See supra* note 4.

agency, in effect, to get the job done."[101] Basic conceptions of political instinct suggest that if Congress may adopt one of two approaches to an issue of national concern—either directly address the problem through explicit legislation or insulate itself from political scrutiny—Congress has incentives to take the latter route. Yet this defeats the purpose of broad based representative assemblies, which is "to require some degree of public consensus before governmental action occurs."[102]

B. *The Constitutional Underpinnings of the Political Accountability Doctrine*

Political accountability ensures that the policies that emanate from Congress are indeed predicated on popular support. In the absence of accountability, not only is the legislative product corrupt, but it is also unconstitutional:

> [T]he theory of political accountability has a solid constitutional foundation. . . . Moreover, the theory of political accountability is also supported by a fundamental, albeit implicit, postulate of the Constitution: democratic self-governance. Courts should invoke the constitutionally uncertain and exceptional power of judicial review, and interfere with democratic self-governance, only if national political choices are not the product of a national majority.[103]

The two instances in which Congress has exercised its Exceptions Clause power have denied courts the opportunity to apply a political accountability test. The Supreme Court, however, has articulated several formulas for measuring the extent to which Congress abides by politically accountable standards.

Courts and commentators have built a solid foundation upon which to extend a theory of political accountability to Article III. The Supreme Court applied political accountability to invalidate part of a congressional legislative scheme in *New York v. United States*.[104] Moreover, relying extensively on Justice Powell's dissent in *Cannon v. University of Chicago*,[105] which explicitly noted the constitutional necessity of political accountability, the Court has scaled back significantly the scope of judicial recognition of implied rights of action.[106] Finally, a growing number of scholars has proposed

101. Wright, *supra* note 2, at 584–85.

102. *Id.* at 585.

103. LaPierre, *supra* note 22, at 642–43.

104. 505 U.S. 144 (1992).

105. 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

106. Interestingly, less than two months after *Cannon*, the Court initiated its steady retreat from broadly inferring private rights of action in federal laws in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). Justice Rehnquist silently rejected the *Cannon* reasoning by noting that the Court's task "is limited solely to determining whether Congress intended to create the private right of action asserted." *Id.* at 568.

vigorous application of political accountability to congressional delegations of legislative authority. To be sure, none of these courts or commentators has directly applied the doctrine of political accountability to Article III. Yet the logic and broader implications compel one conclusion: When Congress exercises its Exceptions Clause power, it must confront the burdens and political costs by deciding the fundamental, underlying policy choices.

In *Cannon*,[107] the Supreme Court found an implied private right of action under Title IX of the Civil Rights Act of 1964.[108] The plaintiff sought an injunction under the statute, which provided that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[109] The Court, despite the statute's silence, found that the legislation did provide a private right of action. What is of interest, however, is the lengthy dissent that Justice Powell filed. Powell went beyond attacking the Court's analysis as unwise. Indeed, he viewed the doctrine of implied rights of action as unconstitutional. Drawing upon the language of *Erie R.R. v. Tompkins*,[110] Powell noted that "[i]f only a question of statutory construction were involved,"[111] it might be permissible to discern legislative intent in the face of silence. However, "'the unconstitutionality of the course pursued has now been made clear' and compels us to abandon the implication doctrine."[112]

The core of Justice Powell's constitutional attack focused on separation of powers.[113] Yet embedded within his analysis was a profound concern for the absence of political responsibility. Powell noted that as the judiciary became more active in assigning rights of action where Congress never explicitly voted to establish them, the courts would "invite[] Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation."[114] Powell elaborated on the constitutional and policy implications that would stem from congressional avoidance:

> Rather than confronting the hard political choices involved, *Congress is encouraged to shirk its constitutional obligation* and leave the issue to the courts to decide. When this happens, *the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned.*[115]

107. 441 U.S. 677 (1979).
108. 20 U.S.C. § 1682 (1994).
109. *Cannon*, 441 U.S. at 681–82.
110. 304 U.S. 64, 77–78 (1938).
111. *Cannon*, 441 U.S. at 742 (Powell, J., dissenting).
112. *Id.* (quoting *Erie*, 304 U.S. at 77–78).
113. *See id.* at 731, 740–42.
114. *Id.* at 743.
115. *Id.* (emphasis added).

In 1980, Justice Rehnquist appealed to political accountability in his concurring opinion to *Industrial Union Department, AFL-CIO v. American Petroleum Institute*.[116] Under § 6(b)(5) of the Occupational Safety and Health Act of 1970, the Secretary of Labor was empowered to set a standard for exposure to toxic substances "which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity."[117] Justice Rehnquist found that the language of § 6(b)(5) gave the Secretary of Labor "absolutely no indication where on the continuum of relative safety he should draw his line."[118]

Intimating that political accountability is constitutionally mandated, Rehnquist asserted that the courts must "reshoulder the burden of ensuring that *Congress itself make the critical policy decisions*."[119] Echoing the reasoning and justifications that Powell articulated in *Cannon*, Rehnquist attacked this law as an "obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge."[120] Here, Congress desired to implement an extensive regulation. Yet it lacked the collective political capital to legislate the intended result directly. Nevertheless, it succeeded by going through the back door—a door hidden from public view and criticism. Had Congress been required to promulgate directly the substantive provisions of the law, the bill's chances of success likely would have been poor.

Political accountability sets a minimum standard for legislative responsibility. According to Justice Rehnquist, the doctrine of political accountability mandates that it is

> the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. *When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress* and the President insofar as he exercises his constitutional role in the legislative process.[121]

Again, political accountability requires Congress to address the salient policy choices that form the core of any legislation. A bill that garners a majority vote, but whose substantive provisions are to be defined later by an entity different from Congress, falls beneath the minimum requirements. Political

116. 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).
117. Occupational Safety and Health Act of 1970, § 6(b)(5), 29 U.S.C. § 655(b)(5) (1994).
118. *Industrial Union Dep't*, 448 U.S. at 675 (Rehnquist, J., concurring).
119. *Id.* at 687 (Rehnquist, J., concurring) (emphasis added).
120. *Id.*
121. *Id.* (emphasis added).

accountability ensures that Congress does not pass facially innocuous legislation that is pregnant with divisive policy choices awaiting implementation from another organ of government.

In 1992, political accountability received its most developed consideration by the Supreme Court. In *New York v. United States*,[122] the Court invalidated a congressional attempt to coerce states to "take title" to toxic waste under the Low-Level Radioactive Waste Policy Amendments Act of 1985.[123] Under this Act, any state that was unable to dispose of its own toxic waste by 1996 would "take title to the waste" and would "be obligated to take possession of the waste."[124] In essence, Congress attempted to force states to regulate according to federal standards, but required the states to implement and finance the program without federal assistance. Thus Congress sought to achieve federal objectives without the concomitant pressure of accounting to a disgruntled electorate. While the Court largely defined the issue as one of federalism,[125] Justice O'Connor employed a political accountability analysis in assessing the Act's constitutionality.

The Court succinctly stated that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[126] If Congress were permitted to fashion legislative schemes in which state officials were forced to implement federal standards, the electorate might mistakenly direct its ire at the relatively blameless state representatives, "while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[127] According to the *New York* Court, Congress would not have offended political accountability had it passed legislation that required *federal* officials to maintain and pay for the storage of radioactive waste in New York. That is, where Congress legislates directly on a particular issue, "the Federal Government . . . makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular."[128] Again, the Court underscored the importance of Congress publicly addressing the underlying policy choices. As in *Cannon* and *Industrial Union*, the *New York* Court elevated congressional responsibility to a level of constitutional primacy.

The decision in *New York* presents a strong political accountability critique of congressional lawmaking. To be sure, the facts in *New York* were particularly egregious. Not only did Congress insulate itself from

122. 505 U.S. 144 (1992).
123. 42 U.S.C. § 2021e(d)(2)(C) (1994).
124. *Id.* § 2021e(d)(2)(C)(i).
125. *See New York*, 505 U.S. at 149 ("This case implicates one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law").
126. *Id.* at 168.
127. *Id.* at 169.
128. *Id.* at 168.

responsibility, but it also coerced a separate government entity to take the blame. In the context of the Exceptions Clause, the latter concern is absent. Nevertheless, the *New York* decision is concerned not just with cases in which Congress forces states to absorb the political fallout from federal decisions, but also with the very legitimacy of congressional action when it is not notorious and subject to public view.

In a prescient article,[129] the *Harvard Law Review*'s commentary on the Supreme Court's 1981 Term questioned the legitimacy of a congressional statute similar to the one invalidated eleven years later in *New York v. United States*.[130] Because the earlier statute did "not compel the states to regulate in the federal interest but merely mandate[d] consideration of federal standards,"[131] it was arguably less troublesome than the one considered in *New York*. By finding the substantially less offensive practice to violate political accountability constraints, the article validates a significantly broader application of political accountability to congressional practice.

C. *The Clear Statement Rule: Drawing Lessons About Political Accountability from the Supreme Court's Eleventh Amendment Sovereign Immunity Jurisprudence*

The Supreme Court's "clear statement" rule in Eleventh Amendment sovereign immunity cases underscores that institution's concerns for, among other things, politically accountable legislation. During the past decade, the Court consistently has held that Congress may abrogate a state's constitutional right to sovereign immunity[132] "only by making its intention unmistakably clear in the language of the statute."[133] This strict insistence on unambiguous legislation is predicated on two concerns: to provide clear notice to those who may be affected by Congress's actions and to ensure that Congress seriously deliberates whether to trump a constitutional right.

In *Welch v. Texas Department of Highways & Public Transportation*,[134] the Supreme Court concluded that Congress failed to state clearly its intention to abrogate sovereign immunity under section 33 of the Jones Act.[135] Although the Jones Act provided that "[a]ny seaman who shall suffer personal

129. *See 1981 Term*, *supra* note 86.

130. 505 U.S. 144 (1992).

131. *1981 Term*, *supra* note 86, at 191.

132. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court affirmed Congress's power to abrogate Eleventh Amendment immunity. The *Bitzer* Court reasoned that Section 5 of the Fourteenth Amendment empowered Congress to abrogate sovereign immunity in order to enforce the substantive provisions of the Fourteenth Amendment. *Id.* at 452.

133. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); *see also* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987).

134. 483 U.S. 468 (1987).

135. 46 U.S.C. § 688 (1994).

injury in the course of his employment may . . . maintain an action for damages at law,"[136] the Court found that this "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[137] Similarly, in *Atascadero State Hospital v. Scanlon*,[138] the Court found that Congress did not act with unmistakable clarity when it authorized lawsuits against "*any recipient* of Federal assistance"[139] who discriminates against handicapped persons.[140] Although the State of California undeniably was a recipient of federal funds, the Court found that this broad provision did not unequivocally demonstrate that Congress intended to abrogate California's constitutional right immunity.[141]

What is striking about *Welch* and *Atascadero* is that two broadly worded statutes, which on their face made no distinction between private and public employers, were held to be insufficiently clear about whether they encompassed state employers. Of course, no one would intimate that the statutes' broad scope would fail to reach private employers. The clear statement rule thus creates a two-tiered approach by which to measure whether a statute authorizes lawsuits against private and state employers.

What justifies this bifurcated calculus? The Court recognizes that normal precepts of accountability and deliberation are insufficient when Congress threatens to abrogate constitutional rights. That is, the Court appreciates that Congress's abrogation authority invests it with extraordinary power to undermine perhaps the most important constitutional right that states possess. Congressional legislation such as that at issue in *Welch* and *Atascadero* poses no constitutional threat to private employers. Yet to extend the reach of those laws to states would imperil important constitutional interests. The elementary notion that constitutional rights are more precious and fragile than nonconstitutional rights accounts for the heightened accountability requirements that the Supreme Court has imposed on Congress's abrogation power.

The clear statement rule attempts to reconcile Congress's recognized abrogation authority with the reality that its exercise may precipitate substantial damage to constitutional rights. A requirement of "unmistakable clear" purpose[142] achieves this tenuous balance in two ways: first, by forcing Congress to consider and seriously deliberate the consequences of its actions; second, by serving an explicit admonition to those whom Congress may affect adversely that their constitutional protections may be insecure. As the Court

136. *Id.* § 688(a).
137. *Welch*, 483 U.S. at 476 (quoting *Atascadero*, 473 U.S. at 246).
138. 473 U.S. 234 (1985).
139. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1994) (emphasis added)
140. *See Atascadero*, 473 U.S. at 242.
141. *See id.*
142. *See id.* at 242.

recently reaffirmed: "Only when Congress *has clearly considered the problem and expressly declared* that any State . . . will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense."[143] By forcing Congress to state distinctly that it intends to abrogate Eleventh Amendment immunity, the clear statement rule compels Congress to address this controversial proposition in an open debate that fosters deliberative legislation.

D. *Applying Political Accountability to the Exceptions Clause*

I now turn to articulate a better interpretation of the Exceptions Clause—an interpretation that accounts for both the literal language of Article III and the external constraints that the Constitution imposes on congressional lawmaking. Like all issues examined under a political accountability rubric, the Exceptions Clause power must be exercised in such a manner that Congress addresses the underlying policy issues. If the Court imposes political accountability requirements, Congress will be forced to contemplate seriously any exercise of its awesome power under Article III. In turn, this deliberation will elevate Congress's actions to a level of national consciousness—informing the electorate and assuring sober use of congressional power.

Political accountability retains Congress's plenary power to restrict Supreme Court jurisdiction over *laws that Congress itself passes*. Yet when Congress insulates *state laws* from Court review, it is often attempting to achieve "through the back door what it could not accomplish in direct, democratic fashion."[144] That is, it is too easy for Congress to empower states to enact legislation that it wanted to pass, but lacked the votes to adopt explicitly. Such a practice allows Congress to set national policy on controversial issues, without facing the political consequences of directly addressing them.

Analyses of the doctrine of political accountability are relatively novel. Until the introduction of the modern administrative state, legislating was an uncomplicated practice. Yet, as federal agencies multiplied, and as Congress began to delegate increasing legislative responsibility, courts and commentators alike questioned the legitimacy of this new practice. When Congress delegates legislative authority to other entities, it balks at deciding the important policy concerns underlying legislation, and similarly eschews the political concomitants of unpopular policy formulation: reaching initial consensus, enduring press coverage, and responding to constituent pressure.

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143. Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 477 (1987) (quoting Parden v. Terminal Ry., 377 U.S. 184, 198–99 (1964) (White, J., dissenting)) (emphasis added).

144. Wright, *supra* note 2, at 586.

1. *Requiring Congress to Address Underlying Policy Choices*

Central to political accountability is Congress's duty to decide the important issues underlying legislation.[145] Several questions must be answered to determine whether Congress invokes its Exceptions Clause power constitutionally. First, does the revocation of jurisdiction reflect a national policy? If so, does the withdrawal of jurisdiction sufficiently indicate that Congress has explicitly adopted that policy? With this calculus, it becomes clear that Congress retains plenary power to strip the Court of jurisdiction to review congressional laws, but it often may not insulate state laws from Court scrutiny.

Recent history counsels that when Congress attempts to exercise its Exceptions Clause power, it is often trying to remove jurisdiction specific to a particular issue.[146] Take, for example, a bill that Senator Helms proposed several years ago.[147] It would have abolished the Supreme Court's jurisdiction over "any case arising out of *any State* statute, ordinance, rule, regulation, or any part thereof . . . which relates to voluntary prayers in public schools and public buildings."[148] If Congress were to enact such a law today, there are several conclusions that one might draw depending on the level of cynicism with which one views Congress. At one end of the spectrum, the law reflects hostility to the Court's conception of the establishment of religion, and heralds a call to promulgate official prayers in public schools. At the other end, the law reflects disagreement with the Court that school prayer is a constitutional issue, and a belief that states are best able to resolve the issue. Regardless of which conception one adopts, the proposal is, at a minimum, predicated on opposition to a constitutionally protected right.[149]

Moreover, under both views, Congress must be deemed to know what might result. That is, it is clearly foreseeable, if not expressly contemplated and desired, that statehouses will take this opportunity to legislate in contravention of the Constitution.[150] To take another example, a bill that

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145. *See supra* Section IV.A.

146. *See supra* notes 4–5 (enumerating congressional bills proposing withdrawal of Court's jurisdiction over abortion and school prayer).

147. *See* S. 481, 97th Cong. (1981).

148. *Id.* (emphasis added).

149. Some might argue that jurisdiction-stripping bills do not oppose particular constitutional rights, rather, they reflect disagreement with the Supreme Court that the right in question is actually protected by the Constitution. However, since 1803 it has been stated that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), *accord* Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . ."). The Exceptions Clause does not dismantle this fundamental principle of constitutional law. It merely permits Congress to legislate in direct contravention of established constitutional rights without review from the federal judiciary.

150. For an interesting discussion of whether state courts would remain bound by the precedent of the Supreme Court, see Redish, *Congressional Power*, *supra* note 51, at 925–26.

would remove abortion cases from the Court's docket[151] clearly is motivated, in whole or in part, by a desire to ban abortion. Admittedly, other concerns such as federalism may play peripheral roles.[152] But it is the legality and regulation of abortion upon which the jurisdiction bill is predicated.

By enacting a vague bill with innocuous language, Congress is able to employ the states as conduits of national policy. Cognizant that several states will accept the "lewd wink"[153] to criminalize abortion, Congress effectively implements national policy without having to vote on the difficult, underlying issue: Should abortion be legal? Political accountability demands more. Congress must address the underlying issue of abortion's legality in order to comport with constitutional design. As discussed previously, Congress does not shirk this difficult policy choice by accident. Rather, delegating ultimate resolution to the states relieves Congress from having to vote directly on whether to ban abortion—a vote that would presumably fall short of a majority. This practice sanctions the imposition of national policy without garnering a national consensus.

There is nothing unconstitutional, however, when Congress passes its own substantive law and concomitantly insulates it from federal court review. If, for example, Congress passed a bill that permitted abortions only when the life of the mother were in jeopardy, it would have clearly articulated an abortion policy. The direct nature of the statute ensures public scrutiny, careful deliberation, and, most importantly, accountability for the policy's effects. Then, if Congress took the extra step of removing this bill from the Supreme Court's appellate jurisdiction, that action would be a valid exercise of its Exceptions Clause power. The difference between this case and that in which Congress insulates state laws is the difference between accountability, deliberation, and due process on the one hand, and insulation, arbitrariness, and unconstitutionality on the other.

2. *Fulfilling the Objectives of the Clear Statement Rule*

The justifications for the clear statement rule in the Court's Eleventh Amendment jurisprudence also hold when one applies the doctrine of political accountability to the Exceptions Clause. First, by requiring Congress to address the underlying policy choice, political accountability ensures greater deliberation within Congress. Like the *Welch* Court, which would find congressional intent to abrogate immunity "[o]nly when Congress has clearly considered the problem,"[154] federal courts should apply the political

151. *See, e.g.*, H.R. 867, 97th Cong. (1981).

152. *See infra* Subsection IV.C.3.

153. Professor Sager coined this phrase in Sager, *supra* note 27, at 41.

154. Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 477 (1987) (quoting Parden v. Terminal Ry., 377 U.S. 184, 198 (1964) (White, J., dissenting)).

accountability doctrine to legislation in which Congress invokes its Exceptions Clause power in order to foster deliberation and reasoned lawmaking. Second, the political accountability doctrine shares the clear statement rule's attempt to place the electorate on notice about congressional actions that may disparage constitutional rights.[155]

Both the clear statement rule and the political accountability doctrine in the Exceptions Clause context are predicated on a recognition that legislating-as-usual may not be adequate when Congress threatens to encroach on constitutional rights. Thus nothing short of specific and unmistakably clear expressions of congressional purpose will suffice to abrogate Eleventh Amendment sovereign immunity.[156] Likewise, the doctrine of political accountability mandates that Congress must define specifically the limits of state authority to transgress settled constitutional law and exempt those acts from Supreme Court review.

The clear statement rule compels Congress to deliberate seriously the consequences of abrogating Eleventh Amendment rights. By doing so, it protects against two evils of unaccountable legislation. First, it ensures that the legislature considers the scope and effect of abrogating the Eleventh Amendment. Second, a clear statement guards against the possibility that Congress may have desired to abrogate sovereign immunity, but simply lacked the political courage to state so explicitly.

These salutary purposes of the clear statement rule apply with equal force to the doctrine of political accountability in the Exceptions Clause cases. Constraining congressional power under the Exceptions Clause by requiring explicit, accountable legislation promotes the same virtues that the Court has lauded in its clear statement rule cases: deliberate consideration and clear warning to those affected.[157] By defining the limits within which states may pass legislation that infringes on fundamental constitutional rights, the doctrine of political accountability safeguards against unwise and promiscuous uses of Congress's awesome power. Neither the clear statement rule nor the doctrine of political accountability denies Congress its constitutional authority to abrogate sovereign immunity or to strip federal court jurisdiction. Rather, these limiting rules reflect a certain skepticism that normal legislative processes are inadequate and unaccountable when Congress stands on the cusp of eroding delicate constitutional rights.

One objection to this analogy is that when Congress strips the Court of jurisdiction, there is no deprivation of a constitutional right. After all, there is no constitutional right to have the Supreme Court hear one's appeal. Moreover, when Congress abrogates sovereign immunity, it affirmatively abolishes a

155. *See Welch*, 483 U.S. at 478 (affirming that Supreme Court "consistently has required an unequivocal expression that Congress intended to overrule Eleventh Amendment immunity")

156. *See, e.g., id.* at 477–78; Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)

157. *See Welch*, 483 U.S. at 477; *Atascadero*, 473 U.S. at 242

constitutional protection. This distinction, however, is specious. While it is true that there is no constitutional right to take one's case to the Supreme Court, when Congress strips the Court of jurisdiction to hear all abortion cases, it is likely that some individuals will lose the fundamental right to elect to have an abortion.

Moreover, it is not entirely clear that Congress definitively strips each state of a constitutional protection merely by passing a statute that purports to abrogate sovereign immunity. In some states, no authorized litigants may have occasion to sue the state. Therefore, those states have not appreciated any lost constitutional right. While this formalism sounds almost absurd, it is no different from those critics who suggest that Congress has not deprived individuals of a constitutional right by stripping the Court of jurisdiction over cases involving a woman's right to have an abortion, for example. In both instances, Congress's act is not sufficient to deny completely a constitutional right. Both situations depend on third party action to consummate the undermining of a fundamental right: Congress's attempt at abrogation requires a litigant to file a lawsuit, and Congress's Exceptions Clause power requires a state to pass an unconstitutional law that escapes Court review. In both instances, fragile constitutional rights hang in a precarious balance. The Supreme Court already has responded to this by promulgating the clear statement rule. The constitutional values that Congress implicates when it exercises its Exceptions Clause power necessitate a check on normal legislating behavior equally as potent as the clear statement rule. The doctrine of political accountability achieves this constitutional imperative.

3. *Comporting with the Language of Article III and Supreme Court Precedent*

Application of political accountability to the Exceptions Clause, unlike other limiting theories, does not require courts to do violence to the language of Article III. The theory does not dispute Congress's plenary power to restrict the Supreme Court's appellate jurisdiction. Rather, it applies a modern principle that has been recognized to constrain congressional lawmaking authority. Additionally, political accountability profits from another advantage over other limitation theories. The Supreme Court has gradually come to recognize political accountability as a constitutional requirement of the legislative process. Not only has the Court applied political accountability to economic and regulatory schemes,[158] but it also has applied more vigorous

158. *See, e.g.*, New York v. United States, 505 U.S. 144, 149 (1992) ("[W]hile Congress has substantial power under the Constitution to encourage the states to provide for the disposal of the radioactive waste generated within their borders, . . . Congress . . . [cannot] compel the states to do so."); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

scrutiny to delegations that implicate fundamental liberty interests.[159] The Supreme Court has intimated that when congressional delegation threatens core constitutional values, it is essential that the lawmaking process strictly adhere to politically accountable standards.

In *Greene v. McElroy*,[160] the Court refused to find an implicit congressional delegation of authority to the Department of Defense to administer a constitutionally questionable security clearance program. The Court conceded that if the case had turned solely upon economic regulation, Congress's action might have been sufficient. However, when Congress attempts to delegate authority that impinges upon constitutional liberty interests, its actions "must be made explicit[] not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because *explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.*"[161] The Supreme Court recognized the dangers of casual lawmaking where vague authorizations threaten protected liberty interests. Moreover, the Court placed a high premium on deliberation as a prerequisite to lawmaking—especially where the legislation's subject may possibly transcend constitutional boundaries.

The Court's opinion in *Greene* underscores the heightened need for applying political accountability to the Exceptions Clause. Certainly, privacy is one of the most fundamental rights that the Constitution protects. When Congress acts under the Exceptions Clause, it is incumbent upon the judiciary to ensure that Congress has explicitly authorized the deprivation of these cherished rights. In turn, requiring explicit lawmaking under the Exceptions Clause will precipitate greater deliberation, maximize public scrutiny, and ensure that if Congress ultimately decides to emasculate constitutional rights, the decision, at least, will be based on a true national consensus.[162]

To be sure, the Court has never applied the theory to the Exceptions Clause. This, however, is not surprising. The only time the Court assessed the propriety of Congress's Exceptions Clause power was in the *McCardle*[163] decision in 1868. Despite *McCardle*'s unique historical context, it has remained a formidable obstacle to internal constraint theorists. The result of *McCardle*,

159. *See, e.g.*, Greene v. McElroy, 360 U.S. 474, 508 (1959) ("[I]n the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded safeguards of confrontation and cross-examination.").

160. 360 U.S. 474 (1959).

161. *Id.* at 507 (emphasis added).

162. Insofar as liberty interests protected by the Constitution are designed to be immune from popular vote and whim, it seems almost comical to discuss requiring a majority before Congress may subordinate constitutional freedoms. Yet that is clearly what the Exceptions Clause contemplates. Nonetheless, the Exceptions Clause should not be read to go any further. Courts must insist that Congress assemble a true consensus before it invokes its power under the Exceptions Clause.

163. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

however, is entirely consistent with political accountability. The 1868 Congress did not insulate any state law from the Supreme Court's review. Instead, Congress merely denied the Court jurisdiction to hear a federal habeas corpus petition brought under an earlier *congressional* authorization. Even if *McCardle* is viewed in a vacuum, without regard to its exceptional historical context, the result erects no precedential barrier to the political accountability theory.

4. *Taking Federalism into Account*

Perhaps Congress's motivation in exempting only state laws from the Court's appellate jurisdiction is more benign than portrayed above. It is conceivable that the animus stems from a concern for federalism—to return to the states the power that they once possessed over fundamental liberty interests such as abortion and school prayer. Does political accountability prevent Congress from ever empowering the states to legislate free from federal judicial scrutiny? Despite diminished accountability and the prospect of greater disrespect for constitutional freedoms, the answer is no.[164]

However, Congress must do more than pass the perfunctory laws that it has proposed in the last few years.[165] A hypothetical example illustrates the contours of the political accountability theory when applied to this federalism context. Let us assume that Congress wishes to permit the states to regulate abortion without the possibility of Court invalidation. Remaining cognizant of the political accountability doctrine's requirement that Congress address the underlying policy questions, the task is to devise a legislative scheme in which Congress confronts these issues, yet defers ultimate resolution to the states.

Congress will sufficiently meet political accountability standards if Congress itself prescribes the precise limits of state regulation. That is, Congress must affirmatively establish a threshold level of regulation beyond which the states may not transgress. Returning to the hypothetical abortion bill, Congress may wish to permit the states unfettered control over abortion, except for emergency health contingencies such as the life of the mother. Even if Congress did not wish to attach any qualifications to the power states would have over abortion, political accountability would still require Congress to state explicitly that it is authorizing the states to regulate abortion without any limits whatsoever. Once Congress defined the parameters of permissible state action, it could then proceed to exempt its law and all state laws passed in accordance with this authorization from the Supreme Court's appellate jurisdiction.

164. Of course, the most constitutionally sound manner by which to commission the states to legislate without fear of federal court review is to amend the Constitution. *See* U.S. CONST. art. V.

165. *See supra* note 4; *see also supra* text accompanying note 148 (quoting relevant portion of bill stripping Court of jurisdiction over school prayer).

Following this approach reconciles the constitutional imperative of accountable lawmaking with the strong interest in federalism. The procedure outlined above does not impair congressional attempts to facilitate state regulation of constitutional liberties. While under this theory Congress may prescribe limits on the discretion that states possess, it need not attach any qualifications. What Congress must do, however, in order to satisfy accountability standards is to address the underlying policy—to wit, the extent to which legislatures may regulate constitutional liberty interests.

Of course, the doctrine of political accountability is not without its limits. Even the theory's strongest advocates concede that delegation, to some extent, is both necessary and constitutional.[166] Yet Congress may delegate without violating accountability. In the administrative context, scholars and jurists alike have found that so long as Congress confronts and resolves the underlying issues of a particular regulatory regime, it may delegate within that policy determination.[167] I do not pretend that political accountability forecloses any delegation. However, if scholars and, to an increasing extent, courts are willing to assert political accountability in purely economic and regulatory areas, the application to fundamental constitutional rights is an easy one.

5. *Remaining Faithful to Constitutional Design and Structure*

In *Federalist 51*, James Madison lauded the new republic's federal design for its singular capacity to vindicate individual and minority rights.[168] In contrast to the parochial interests of smaller state bodies, Madison found that Congress, "by comprehending in the society so many separate descriptions of citizens . . . render[s] an unjust combination of a majority of the whole very improbable, if not impracticable."[169] The wisdom of Madison's insights remains as powerful today.

Congressional proposals that withdraw jurisdiction over state laws in order to avoid public accountability appreciate the phenomena Madison identified in *Federalist 51*. When it legislates accountably, Congress's "multiplicity of interests"[170] substantially minimizes the possibility that "a coalition of a majority of the whole society could . . . take place on any other principles than those of justice and the general good."[171] Although Congress has strayed from Madison's noble vision at times, it has proven itself immune from many of the factions that have seized statehouses during the past two centuries.

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166. *See* Krent, *supra* note 88, at 63 n.8; LaPierre, *supra* note 22, at 657; Merritt, *supra* note 90, at 25.

167. *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring); LaPierre, *supra* note 22, at 653.

168. *See* THE FEDERALIST NO. 51, *supra* note 70, at 323–25 (James Madison).

169. *Id.* at 324.

170. *Id.*

171. *Id.* at 325.

Indeed, the quotation that appears at the beginning of this Note underscores Oliver Wendell Holmes's faith in Congress and concomitant distrust of state legislatures' propensity to abide by the Constitution.[172] Commenting on his unique capacity to evaluate the more parochial, and often unconstitutional, character of local laws that regulate commerce, Holmes noted that: "For one in my place sees how often a local policy prevails with those who are not trained to national views and *how often action is taken that embodies what the Commerce Clause was meant to end.*"[173]

Madison's observations, and the republican government he envisioned, are most consistent with the political accountability theory. By limiting the scope of Congress's Exceptions Clause power to the insulation of its own laws, the political accountability theory draws on the natural political forces that Madison identified. First, sheer numbers and diversity of opinion will minimize the frequency with which Congress attempts to strip the Court of jurisdiction. Second, when Congress is able to muster the votes and elects to exercise its Exceptions Clause power, these same forces—numerosity and diversity of opinion—will dilute the strong factional forces that may exist within state legislatures. Accordingly, there is reason to suspect that the laws that would emanate from Congress would be substantially more moderate than laws that originated in statehouses.

V. CONCLUSION

The political accountability theory prevents Congress from manipulating the Supreme Court's jurisdiction over fundamental constitutional rights through legislative sleight-of-hand. In contrast to many internal constraint arguments, the accountability theory enjoys doctrinal support. Although the Supreme Court has not applied the doctrine of political accountability to the Exceptions Clause, it has invoked the doctrine to constrain other manifestations of congressional power. Because the Court has recognized that the doctrine generally constrains Congress, there is a legitimate basis for applying the doctrine as an external constraint on Congress's Exceptions Clause power. Unlike many other proposals to limit this power, the accountability theory reconciles the literal language of Article III with constitutional design. Moreover, the political accountability doctrine allows courts to summon forth the political forces that the Framers designed to constrain congressional power. By insisting that Congress affirmatively decide the policy questions that it seeks to remove from the Court's jurisdiction, the theory ensures accountability, deliberation, and moderation.

172. *See supra* note 1 and accompanying text.

173. HOLMES, *supra* note 1, at 296 (emphasis added).